No. 96-1577

(8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, ALABAMA, ARIZONA, COLORADO, CONNECTICUT, FLORIDA, ILLINOIS, INDIANA, LOUISIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, OHIO, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT AND WYOMING IN SUPPORT OF PETITIONER STATE OF ALASKA

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INTEREST OF THE *AMICI* STATES

The States of the Union face a new and troubling challenge to their sovereignty and jurisdiction. The Ninth Circuit Court of Appeals has brought into the ambit of Indian country (and thus out of the ambit of most state jurisdiction) vast lands in the State of Alaska. It has done so by simply declaring that a "dependent Indian community" exists on these lands, using a novel, unworkable and confusing standard that could well facilitate the

judicial recognition of Indian country on similar lands in and throughout the various States, lands not heretofore recognized as Indian country.[1]

While construing a congressional settlement act relating to Alaska Native land claims, the Ninth Circuit rested its construction on its reading of another federal statute, 18 U.S.C. 1151, defining "Indian country," and various judicially-created standards that have evolved for the past 50 years. However, by construing these standards too broadly, the Court of Appeals has accomplished precisely the opposite of what Congress intended in enacting the Alaska Native Claims Settlement Act ("ANCSA"). The consequences of this decision are especially unsettling and troublesome to Alaska and the other States.

Judicial, rather than congressional, creation of Indian country is particularly disturbing to the States, their officials and their citizens, to whom the Congress is politically accountable and responsible whenever it alters or limits State power and jurisdiction under the powers given to it in our federal system. Judicial designation of Indian country in contravention of or in the absence of an act of Congress may divest States of civil and criminal jurisdiction on lands within the borders of those States where that jurisdiction historically has applied, without such accountability. The divestiture of state power may include the loss of the ability to enforce state criminal codes, to apply a state's civil laws in a uniform manner, to tax and evenhandedly regulate routine activities on those lands, and to protect the state's natural resources, environmental quality and consumer health and safety.

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[1] Each *amici* State either already has or may in the future have within its borders lands recognized as Indian country. Significantly, the States may also have citizens who are Indians, either tribal members from that or another State or those seeking federal recognition as tribal members, but who have no land recognized as Indian country. States have expressed their concern that recognition of Indian country under the premises in this case will divest jurisdiction long assumed to be intact and legitimate.

States also face assertions of tribal authority to tax, to regulate the land of non-members, to subject non-members to tribal court adjudications, to engage in gambling activities, and to control timbering, mining, water use, hunting and fishing in this newly-determined "Indian country," thereby affecting the state's resources and environmental quality. As individual Indians and Tribes assert various claims of rights and interests against the States through litigation, States increasingly are struggling to defend legitimate State interests and sovereignty.

The amici States' difficulty arises from the Court of Appeals' overly-broad and erroneous formulation of what constitutes a Federal "set aside" for purposes of finding a "dependent Indian community" under 18 U.S.C. 1151(b) and its assumption of Federal "superintendence" from the on-going relationship between any Tribe and the United States and from virtually *any* Federal involvement. The Ninth Circuit so stretched the standards for "dependent Indian community" in this case that other courts may not be able to avoid finding a "dependent Indian community" on various lands claimed by Indians, notwithstanding congressional disclaimers to the contrary, the non-federal title of lands, lack of federal control or regulation of the lands, or minimal federal involvement in any land transfer or holding.

Amici States fear they will face claims by tribal interests that have taken unilateral actions to acquire land and, based on minimal federal presence in the area, successfully assert the lands are Indian country as a "dependent Indian community." Indeed, in this case, the acquisition of the land in fee by the Native Village of Venetie Tribal Government ("Village"), was, as the District Court found, a unilateral act of the village, not an acquisition or grant by or from the federal government. Moreover, the acquisition by the Village was not pursuant to any specific federal statute, order or regulation. The Village acquired the land in fee from the state chartered corporations. Yet, the Ninth

Circuit reached further back, finding ANCSA's transfer of land to the corporations was a "set aside" for the Village, ignoring the subsequent unilateral act of the Village to acquire the land in fee. Indian Tribes on the East Coast, in the Midwest and South, and in California, Oregon, Washington, Wyoming and Idaho, have purchased land to expand their landholdings. Nothing prevents a Tribe from acquiring lands in States other than where the Tribe is principally located, including in States which currently have no recognized Indian country. These lands generally are subject to state and local civil and criminal authority and taxation powers. However, even though these lands may be purchased "unilaterally," i.e., solely by the Tribe as fee lands, some measure of federal involvement, approval or restraint on alienation may accompany these purchases. Unless this Court corrects the Ninth Circuit reasoning, the States may face a significant, but unwarranted, displacement of state authority and jurisdiction.

SUMMARY OF ARGUMENT

The intent of Congress in the Alaska Native Claims Settlement Act ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688, 43 U.S.C. 1601 *et seq.*, was to transfer land to the state-chartered Native corporations in settlement of Native land claims, not to establish a new form of Indian country. Amici States agree with Alaska that Congress intended an entirely new approach in ANCSA, unparalleled in federal Indian relations. It specifically eschewed traditional reservations and trust lands and significantly displaced federal and Native governmental authority with state authority. Amici States agree with the United States District Court and the relevant Interior Solicitor's Opinion that the ANCSA-transferred lands are not Indian country.

While in this case the Ninth Circuit construed one statute, ANCSA, its conclusion that the land at issue is a "dependent Indian community" rests on its construction of another federal statute, 18 U.S.C. 1151. That statute,

enacted in 1948, defined "Indian country" in the criminal code, and it included several general categories, including reservations, dependent Indian communities and Indian allotments. The statute was designed to consolidate numerous conflicting and inconsistent decisions of the courts. However, in this case, the Ninth Circuit fashioned such broad standards for a "dependent Indian community" under section 1151 as to suggest that courts may attach that legal status to lands long understood not to be Indian country and which are otherwise subject to state civil and criminal laws.

Long before the statute was enacted to codify existing law, this Court has adopted a fundamental test for "Indian country," rejecting any crucial distinction among the forms of Indian country. This Court has always asked whether the lands in question have been validly *set apart* for the use of Indians, *as such*, under the *superintendence of the Government*, language derived from *United States v. McGowan*, 302 U.S. 535, 539 (1938), and *United States v. Pelican*, 232 U.S. 442, 449 (1914). It is the requirement of "set aside" and "superintendence" which is essential to determining whether lands are in fact Indian country and essential in the test for "dependent Indian community."

Of course, the consequences of a judicial finding that Indian country exists on lands within a state not previously understood to fall within that status are profound. First, the full application of the state's criminal laws are jeopardized. Additionally, a judicial recognition of Indian country deprives a State of its ability to apply its civil laws in a uniform manner, to tax activity on those lands, and to protect the state's natural resources, environmental quality and consumer health and safety.

One of two principal difficulties in the Ninth Circuit *Venetie* decision is its overly-broad acceptance of *any* federal involvement as satisfying the kind of federal superintendence necessary for a finding of a "dependent Indian

community." This Court's decision in *McGowan* referred to the government retaining *title* to lands and having the *authority to enact regulations and protective laws for the lands*. 302 U.S. at 539. Yet, the Ninth Circuit disregarded this test and concluded that the federal government's on-going involvement with Indians and the Village sufficed to establish Indian country. The policy implications of the Ninth Circuit decision are significantly detrimental to the States and their citizens. Further, it will lead to endless and protracted litigation over lands long understood not to be Indian country, fully subject to state jurisdiction. Amici States suggest this Court adopt a standard which makes it clear that, in order to be a "dependent Indian community," the federal government, not the state, be the dominant political institution in the area. This standard would ensure that this Court's requirement of "federal superintendence" is respected before courts summarily take lands out of state jurisdiction.

The second difficulty arises from the Ninth Circuit's reading of this Court's "set aside" requirement. The appeals court ignored the unilateral nature of the Village's own acquisition of the land from the state-chartered Native corporation, and instead recognized a federal set-aside for the Village. It was not, however, the intent of Congress to set aside this land as "Indian country" in general, nor as a "dependent Indian community" in particular.

In sum, amici States believe this Court would further a favorable policy and more predictable results under the law by adopting a standard which requires a true and *direct* "set aside" by the Congress of lands intended to be a "dependent Indian community." Similarly, this Court may favorably settle Indian law and policy by adopting a standard for "federal superintendence" that requires that the federal government, not the state, be the *dominant political institution* in the area.

ARGUMENT

I.

THE NINTH CIRCUIT HAS RADICALLY MISINTERPRETED THE INTENT OF CONGRESS IN THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Amici States adopt and support the arguments of the State of Alaska in which that State submits that the Ninth Circuit has radically misread the intent of the Congress in its passage of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. 1601 et seq. While ANCSA was directed at but one State, the other States agree with Alaska that congressional intent was blatantly disregarded in this case, which, by itself, has ominous implications for all States. In transferring land to the state-chartered corporations in settlement of Native land claims, Congress undertook an entirely new approach in ANCSA, unparalleled in federal Indian relations. It is one that expressly eschewed traditional reservations and trust lands and substantially displaced federal governmental authority with state authority. See Department of Interior, Sol. Op. M-36975, January 11, 1993, at 107-112. Yet, the Ninth Circuit has read ANCSA to provide just the opposite.

Both the United States District Court in this case and an Interior Department Solicitor's Opinion, which exhaustively reviewed the legal status of lands that were the subject of ANCSA, correctly concluded that the ANCSA-transferred lands are not Indian country. Department of Interior. Sol. Op. M-36975, January 11, 1993. Amici States agree with the analysis in the district court opinion and the Solicitor's Opinion, and urge this Court to do the same.

II.

THE JUDICIAL RECOGNITION OF A "DEPENDENT INDIAN COMMUNITY" ESSENTIALLY DIMINISHES THE STATES' TRADITIONAL POLICE POWERS AND SOVEREIGN AUTHORITY TO PROTECT AND REGULATE THE CONDUCT OF THEIR CITIZENS

While in this case the Ninth Circuit construed one statute, the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. 1601 et seq., its conclusion that the land at issue is a "dependent Indian community" rests on its construction of another federal statute, 18 U.S.C. 1151. That statute, enacted in 1948, defined "Indian country" in the criminal code, as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished. . . .

18 U.S.C. 1151. The statute was designed to codify a series of decisions of this Court. Reviser's Note, Act of June 25, 1948, c. 645, 62 Stat. 757; *United States v. John*, 437 U.S. 634, 648-49 (1978). Yet, as discussed below, the Ninth Circuit adopted in this case such broad standards for finding a "dependent Indian community" under 1151(b), and thereby "Indian country," as to suggest that courts may attach that legal status to lands long understood not to be Indian country and which are otherwise subject to state civil and criminal laws.

When assessing whether state or tribal powers apply to lands claimed by Indians, this Court has informed us that the inquiry starts with "whether the land is Indian country." *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 125 (1993), citing *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991). Because Congress, in section 1151, simply provided broad categories of Indian

country, without giving qualifying requirements or standards, it has been for the courts to provide them.[2] This Court has repeated its fundamental test for "Indian country" over time, rejecting any crucial distinction among the forms of Indian country: "Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma*, at 511, quoting *United States v. John*, 437 U.S. 634, 648-49 (1978). This language, in turn, derives from this Court's earlier decisions in *United States v. McGowan*, 302 U.S. 535, 539 (1938), and *United States v. Pelican*, 232 U.S. 442, 449 (1914). It is this requirement of both "set aside" and "superintendence" which is essential to determining whether lands are in fact Indian country and meet the test for "dependent Indian community." The failure of the Ninth Circuit to properly apply these requirements is the heart of the problem in the *Venetie* decision.

This Court addressed the notion of a "dependent Indian community" in *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. McGowan*, 302 U.S. 535 (1938). Both of these cases were decided before the enactment of section 1151(b), which simply codified the term from the case law as one of three statutory categories of Indian country. In *Sandoval*, this Court construed a congressional act designating that the lands held by the New Mexico Pueblos were "Indian country." *Id.*, at 37-39. In describing the special circumstances of that case, this Court noted the United States exercised various con-

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[2] Consistent with *Narragansett Indian Tribe v. Narragansett Electric Co.*, 89 F.3d 908, 916-922 (1st Cir. 1996), the Eighth Circuit Court of Appeals recently noted the categories that constituted "Indian country" included on the one hand "allotments, the Indian titles to which have not been extinguished" under 18 U.S.C. 1151(c), and lands which constituted "Indian country" because they were "dependent Indian communities" under 18 U.S.C. 1151(b). *United States v. Stands*, 105 F.3d 1565, 1571-1572 (8th Cir. 1997).

trols, authority and its "fostering care and protection over all *dependent Indian communities* within its borders. . . ." *Id.*, at 46 (emphasis added).

In *McGowan*, this Court examined whether an Indian colony on lands owned by the United States, purchased out of funds appropriated by the Congress in 1917 and 1926 to provide for needy non-reservation Indians in Nevada, qualified as Indian country. *United States v. McGowan*, 302 U.S. at 537. Relying on the language in *Sandoval*, the Court noted that the Colony was (1) under the superintendence of the federal government; (2) the government retained title to lands; and (3) the government had authority to enact regulations and protective laws for the lands. *Id.*, at 539. *McGowan* was the last case of this Court to address the meaning of "dependent Indian community."

A "reservation" established by congressional or executive action is undoubtedly the principal form of Indian country.[3] "Dependent Indian community," however, has evolved into the exception to the rule, even though *Sandoval* and *McGowan* both turned on congressional acts. Since the enactment of section 1151(b), the courts have been asked to identify "dependent Indian communities" on lands not explicitly designated as Indian country by either the Congress or the Executive branch. These courts have applied judicially-evolved tests to determine whether certain lands qualify under section 1151(b). *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *United States v. South Dakota*, 665 F.2d 837, 839 (1981), *cert. denied*, 459 U.S. 823 (1982).

[3] Creating reservations is the principal means by which the federal government establishes Indian country and presents the fewest problems in the analysis of where tribal jurisdiction applies and where state jurisdiction is limited. Spaeth, *American Indian Law Deskbook*, 35 (U. Colo. 1993). In the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461-479, Congress delegated to the Secretary of Interior the power to acquire and designate new lands set aside for Indians as reservations. 25 U.S.C. 465, 467. It appears this is the standard means of establishing new Indian country.

The consequences of a judicial finding that Indian country exists on lands within a state not previously understood to fall within that status are profound. Foremost, the application of the state's criminal laws, an area "where States historically have been sovereign," *United States v. Lopez*, —— U.S. ——, 115 S. Ct. 1624, 1632 (1995), falls into doubt. The "historic police powers of the States' are not displaced by a federal statute 'unless that was the clear and manifest purpose of Congress.'" *Id.*, at 1640 (concurring op. of Kennedy, J., quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).) In section 1151, Congress exercised its plenary power in Indian affairs by defining Indian country (and thereby allowing the displacement of the States' criminal laws), but provided no new standard in defining the term "dependent Indian community," presumably leaving *Sandoval* and *McGowan* as the benchmarks.

The displacement of most state criminal law when Indian country is established or recognized is generally well understood. This Court has recognized that the displacement is as much a function of congressional plenary power as of any inherent tribal power. *Compare Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), *with United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172, n. 7 (1973); *Antoine v. Washington*, 420 U.S. 194, 201-202 (1975). Congress has provided for federal criminal jurisdiction *within Indian country* for the general laws of the United States as to the punishment of offenses, 18 U.S.C. 1152, various "major" crimes, 18 U.S.C. 1153, and in liquor-related prohibitions, 18 U.S.C. 1154-56, in cases involving offenses by or against Indians.[4] Congress has pro-

[4] Numerous other federal laws are directed to Indian country, which also serve to displace state criminal law or to assimilate it

vided that a few States shall have criminal jurisdiction as to offenses committed by or against Indians in Indian country the same as outside Indian country. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. 1162 ("Public Law 280," or "P.L. 280").[5] However, even as to P.L. 280 states, that jurisdiction is limited by court rulings and subsequent congressional acts. *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976); *California v. Cabazon*, 480 U.S. 202, 209-210 (1987) (P.L. 280 authorizes criminal jurisdiction only with respect to criminal prohibitory, not civil-regulatory laws; only criminal laws of statewide application and not local criminal codes apply); *Pfingst v. Sycuan Band of Mission Indians*, 54 F.3d. 535 (9th Cir. 1995), 18 U.S.C. 1166(c) ("gaming" offenses in P.L. 280 states the subject of exclusive prosecution by the United States). Thus, recognized as such, they essentially "carve out" of the State its most cherished and traditional police power, that of enforcing its criminal laws, equally among its citizens.

Additionally, a judicial recognition of Indian country deprives a State of its ability to apply its civil laws in a uniform manner, to tax activity on those lands, and to protect the state's natural resources, environmental quality and consumer health and safety. See Petition, pp. 14-15. Of particular importance to States is their jurisdiction to impose environmental laws and regulations consistently and uniformly throughout the State for the protection of the state's resources and its citizens. Such vital jurisdiction is lost when a court recognizes Indian country. *See Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (recognizing "the vital interest of the State of Washington in effective hazardous waste management throughout the state, including on Indian lands," but squarely rejecting the state's authority to regulate "hazardous waste-related activities on Indian lands."). In turn, states may face assertions of tribal authority to tax, to regulate the land of non-members, to subject non-members to tribal court adjudications, to engage in gambling activities, and to control timbering, mining, water use, hunting and fishing in this newly-recognized "Indian country," thereby affecting the state's resources and environmental quality.

and leave it to federal prosecution, e.g., 18 U.S.C. 437, 1158, 1159, 1163, 1164, 1165, 1166-68.

[5] Congress has also conferred criminal jurisdiction on certain states with respect to Indian country offenses for specific Tribes under statutes other than P.L. 280, e.g., Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa); 18 U.S.C. 3243 (Kansas); *id.*, 232 (New York); *id.* 1747 (Florida); several statutes conferring same on Oregon as to specific Tribes.

In this case, the Ninth Circuit expands Indian country in Alaska, and, by means of its loose standard for a "dependent Indian community," it opens the door to carve out of the States significant state sovereign interests. It allows the recognition of Indian country willy-nilly, and is so broad as to suggest Indian country recognition where there is the "mere presence of Indians in a particular area . . ." *See United States v. Martine*, 442 F.2d 1022, 1024 (10th Cir. 1971). At the very least, it opens the door to endless and protracted litigation. Amici States urge this Court to reject the standard and the inevitable results.

III.

THIS COURT SHOULD ADOPT THE FIRST CIRCUIT STANDARD THAT A "SET ASIDE" AND "SUPERINTENDENCE" ARE MET ONLY WHEN THE FEDERAL GOVERNMENT, NOT THE STATE, IS THE DOMINANT POLITICAL INSTITUTION IN THE AREA.

United States v. McGowan, 302 U.S. 535, decided by this Court in 1938, was the last case of this Court to address a "dependent Indian community" before Congress codified "Indian country" in 18 U.S.C. 1151. *McGowan* not only required the superintendence of the federal gov-

ernment, it referred to the government retaining *title* to lands and having the *authority to enact regulations and protective laws for the lands.* 302 U.S. at 539.

The term "dependent Indian community" itself suggests the reach of § 1151(b). First, an "Indian *community*" must exist—a requirement indicating that more than just a discrete piece of property is involved. The notion of an "Indian community" reflects what was present in *Sandoval*: a geographical area set aside for the exclusive occupancy of a culturally and politically distinct group of Indians. Second, the Indian community must be "dependent" in nature; i.e., the land in question must have been set aside for the purpose of continuing the wardship status of the community's members and facilitating the Government's discharge of its trust responsibilities. In *McGowan*, for example, Congress created the Reno Colony "to provide lands for needy Indians scattered over the State of Nevada[] and to equip and supervise these Indians in establishing a permanent settlement." 302 U.S. at 537. Lower federal courts have adopted differing approaches to determining whether these elements exist, but none has departed so radically from the basic guideposts as the Ninth Circuit.

After the passage of 18 U.S.C. 1151(b), the Tenth Circuit in *United States v. Martine*, 442 F.2d at 1023-24, formulated a three-part test requiring analysis of: (1) the nature of the area in question; (2) the relationship of the inhabitants of the area to Indian Tribes and the federal government, and (3) the established practice of government agencies toward the area. In *Martine*, the court, with no analysis, summarily found a dependent Indian community on lands purchased with tribal funds from a corporate owner, and relied on the findings of the trial court as to the elements of the three-part test above.

The Eighth Circuit in *United States v. South Dakota*, 665 F.2d 837, refined the test, incorporating the

Martine test only in its second prong,[6] but setting forth key elements for analysis, including whether there is federal title, retention of federal authority, and the "set aside" and "superintendence" elements. In *Venetie*, however, the Ninth Circuit re-wrote the Eighth Circuit test by dropping reference to federal "title," finding that unimportant, 101 F.3d at 1292, suggesting instead that the courts look to the "degree of federal ownership and control." It labeled its test more "textured" than the district court's, which generally followed *South Dakota*. In rejecting the Eighth Circuit's tests, the Ninth Circuit has significantly enhanced the probability that lands heretofore subject to state jurisdiction will be removed from state jurisdiction.

While the court in *South Dakota* found a dependent Indian community on lands that were the subject of a HUD-financed housing project, it importantly included in its test the *McGowan*-derived "title" element (the *federal government* held the land in trust for the tribe) and the *Mound*-derived "set aside" element (the land was designated for use for the Tribe's Low Rent Housing Project).

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[6] The Eighth Circuit offered a four-part test: (1) whether the United States retained *title* to the lands and retains authority to enact regulations and protective laws as to those lands, citing *Weddell v. Meierhenry*, 636 F.2d 211, 212 (8th Cir. 1980), *cert. denied*, 451 U.S. 941, 101 S. Ct. 2024, 68 L.Ed.2d 329 (1981)); (2) the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and the federal government, and the established practice of government agencies toward the area, 636 F.2d at 212, *citing United States v. Martine*; (3) whether there is an element of cohesiveness there, 636 F.2d at 212-13, *citing United States v. Morgan*, 614 F.2d 166, 170 (8th Cir. 1980); and (4) whether the land has been set apart for the use, occupancy and protection of dependent Indian peoples, 636 P.2d at 213, *citing United States v. Mound*, 477 F. Supp. 156, 158 (D.S.D. 1979), *citing Youngbear v. Brewer*, 415 F. Supp. 807, 809 (N.D. Iowa 1976), *aff'd* 549 F.2d 74 (8th Cir. 1977). *United States v. South Dakota*, 665 F.2d at 839.

Amici States submit that the First Circuit Court of Appeals in *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996), has provided the most faithful rendition of the factors set forth by this Court before section 1151 was passed and the factors articulated in subsequent decisions by the First Circuit and other Courts of Appeals. In *Narragansett*, the court found that there was no federal set aside. It adopted a view that a "set aside" *must* be tied to the requirement in *McGowan*, *Pelican* and *Mound*, that the land *must* be under the superintendence of the federal government. The *Narragansett* court noted such superintendence is shown only

> 'where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention *that the federal government, not the state, be the dominant political institution in the area.*'

89 F.3d at 920, quoting the District Court decision in this case, *Alaska v. Native Village of Venetie*, 1995 WL 462232 (D. Alaska Aug. 2, 1995) at 14 (*rev'd*, 101 F.3d 1286.). While the federal government engaged in various programs in *Narragansett*, such as BIA financial assistance and HUD housing projects, there was no evidence that Congress intended that the federal government have a role there as the dominent political institution.

The Ninth Circuit in *Venetie*, however, expressly rejected the requirement that the federal government be the dominant political institution in the area. In its more "textured" approach, the Ninth Circuit allows virtually *any* federal activity in the area, flowing from the government's on-going relationship with Indians and Native Alaskans, to constitute the kind of "superintendence" that satisfies this Court's test. Nor does it provide a threshold level of federal activity to enable one to make a reasonable determination of what constitutes "superintendence." Amici States submit the First Circuit's "dominant political institution" test furthers predictability under the law and a generally favorable policy—one that reflects

significant federal interests only when there is a dominant federal presence.

The *Narragansett* court also looked to *Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1992), for the significance of the United States taking land into trust as indicia of a federal intent to "set aside" the lands for the Indians, as such, and wherein federal control will become dominant. While *Narragansett* stated that federal title is not a prerequisite, *see Martine*, 442 F.2d at 1023, it also noted lack of federal title weighed against the Tribe's claim. 89 F.3d at 921. The court observed that in the majority of cases in which the land was privately held, the courts found there was not a dependent Indian community, and that in *Buzzard, a unilateral* purchase by the Tribe of lands which it then subjects to a restriction on alienation by the federal government cannot constitute the "set aside" or "superintendence" necessary for recognition of a dependent Indian community. *Id.*

In *Venetie*, the Ninth Circuit sidestepped the point in *Buzzard*, and held the necessary "set aside" derived from the congressional approval of the land settlement. The Court of Appeals ignored the express intent of the Congress *not* to create trust land or reservations for Alaska Natives, instead requiring the land be transferred to state-law corporations. It also ignored the fact that the Village acquired the land from the state-chartered corporation *unilaterally*, not from the federal government, nor pursuant to any federal statute, order or regulation. It dismissed the notion that federal title should play any role in its analysis, noting that Indian country was found where the Tribe held fee title in the seminal case on the subject, *United States v. Sandoval*, 231 U.S. 28. The Ninth Circuit failed to acknowledge the special circumstances in *Sandoval*, where this Court construed two *congressional acts* that specifically treated the Pueblos as Indian country.

Most significantly, the Ninth Circuit dismissed the notion that the federal government must evince an intent to be the dominant political institution: apparently, any modicum of federal activity in relationship to the Tribe suffices. The First Circuit in *Narragansett* provides a clean test to determine a threshold level of federal involvement, and amici States urge this Court adopt that standard to provide reliability and certainty in the matter.

Finally, the Ninth Circuit dismissed the notion that superintendence must relate in any way to the land, but instead, need only go to Indian people. This disengagement of superintendence from the land permits a finding of superintendence to arise merely from the relationship that the federal government has with Indians in general. Amici States, in the interest of seeking certainty and reasonableness for future judicial determinations of "dependent Indian community," respectfully urge this Court to adopt standards that measure up to this Court's requirements from *Sandoval* and *McGowan*. The language of *Narragansett* provides this Court with that opportunity, as it reflects this Court's original jurisprudence. *Venetie*, on the other hand, fails the test and should be reversed.

CONCLUSION

This Court has the opportunity in this case to provide clear guidance to other courts on when and where Indian and Native Alaskan tribal jurisdiction should be judicially recognized using the concept of a "dependent Indian community." Because of the serious displacement of significant State interests when courts make findings of Indian country, amici States urge this Court to confine this kind of judicial recognition to those cases where Congress has clearly spoken. This Court may reach back to its original holdings and principles relating to "dependent Indian communities," holdings upon which Congress acted. These principles require a direct "set aside" of lands by the federal government for the Indians and federal superintendence that includes a dominant political presence on those lands. The Ninth Circuit Court of Appeals ignored the intent of Congress and read its own novel, unworkable standards into a judicial determination of Indian country, to the detriment of the sovereign interests of Alaska and its citizens, and to the potential detriment of all the States and their sovereign interests. The Ninth Circuit decision in *Venetie* leads to unpredictability and confusion in Indian law, and, consequently, this Court should reverse it.

Respectfully submitted,

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